No. 48744-6-II

Court of Appeals, Div. II,
of the State of Washington

Steve Berschauer,

Appellant,

v.

State of Washington, Department of Enterprise Services, et al.,

Respondents.

Reply Brief of Appellant

Kevin Hochhalter
Attorney for Appellant

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 43124

with

Jon E. Cushman
Daniel Berner
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183

Table of Contents

Table of Authorities

Table of Cases

Constitutional Provisions

Statutes/ Rules

1. Introduction

The State's boundary line adjustment, approved by the City of Olympia, is void *ab initio* for failure to include Berschauer as an owner of some of the property that was being adjusted. A void act can be challenged and reversed at any time. In every other arena, this principle of voidness prevails over the principle of finality. The land use arena should be no different. The City's arguments would allow illegal and void actions to be validated and unassailable a mere 21 days later. The result would be an unlimited expansion of municipal power—so long as city officials keep their unauthorized land use decisions under the radar for 21 days, they could do anything. Void acts must be subject to challenge. This Court should reverse dismissal of Berschauer's claim and remand for further proceedings.

2. Reply Argument

2.1 Dismissal under CR 12 is reviewed de novo.

Contrary to the City's assertion, customary principles of appellate review apply to declaratory judgment actions. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001) (citing *Nollette v. Christianson*, 115 Wn.2d 594, 599-600, 800 P.2d 359 (1990)). Questions of law are reviewed de novo. *Nollette*, 115 Wn.2d at 600; *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301 P.3d 45 (2013).

A trial court's ruling to dismiss a claim under CR 12(b)(6) or CR 12(c) is reviewed de novo. *J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wn.2d 95, 100, 359 P.3d 714 (2015). The City's motion to dismiss involved a single legal question: whether the LUPA statute of limitations applied to bar the action. CP 29-30. The trial court dismissed the action on that basis. RP, Feb. 26, 2016, at 20. Whether a claim is time barred is a legal question the court reviews de novo. *Bilanko v. Barclay Court Owners Ass'n*, 185 Wn.2d 443, 448, 375 P.3d 591 (2016).

The cases cited by the City to support its position do not apply here. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971), did not involve a declaratory judgment action at all. Rather, it was an action for an injunction to bar a threatened violation of statutory privacy rights relating to mental illness hearings. *Id.* at 13-14, 16-17. The statute allowed for the hearings and files to be opened to the public in the discretion of the court. *Id.* at 23. Accordingly, the abuse of discretion standard applied. *Id.* at 26. *Carroll* simply does not apply.

Sheng-Yen Lu v. King Cty., 110 Wn. App. 92, 38 P.3d 1040 (2002), applied the abuse of discretion standard to a trial court's refusal to consider a declaratory judgment because there was an adequate alternate remedy. *Id.* at 99. Here, the trial court **did** consider the merits of the declaratory judgment action; the now

inapplicable doctrine of adequate alternate remedy is not at issue.[1] *Sheng-Yen Lu* does not apply.

In *WFSE v. State*, 107 Wn. App. 241, 26 P.3d 1003 (2001), the trial court dismissed a declaratory judgment action because there was no justiciable controversy; the trial court did not reach the merits of the claim. *Id.* at 245. The court of appeals applied an abuse of discretion standard and found no abuse in declining to consider the action on the grounds of no justiciable controversy. *Id.* at 244-45. The court's statement of the standard of review, quoting *Nollette*, 115 Wn.2d at 599, is somewhat confused and could be misread to apply an abuse of discretion standard to a decision on the merits. However, the Washington Supreme Court has since clarified that its prior decision in *Nollette* means that the customary appellate standards of review apply to declaratory judgment actions. *To-Ro Trade Shows*, 144 Wn.2d at 410 (citing *Nollette*, 115 Wn.2d at 599-600); *accord Wallin*, 174 Wn. App. at 776. The issue here—whether a claim is time barred—is a legal question the court reviews de novo. *Bilanko*, 185 Wn.2d at 448.

---

[1] The Washington Supreme Court recently clarified that after the adoption of CR 57, "The existence of another adequate remedy **does not** preclude a judgment for declaratory relief in cases where it is appropriate." *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 605, 374 P.3d 151 (2016) (quoting CR 57) (emphasis added). Declaratory relief is available "whether or not further relief is or could be claimed." RCW 7.24.010.

2.2 The State's boundary line adjustment was void because it was not approved by all property owners as required by the Olympia Municipal Code.

As noted in Berschauer's opening brief, Br. of App. at 6, government action is void *ab initio* where the government entity lacks any authority to take the action or where it fails to comply with a statutorily mandated procedure in a way that defeats the underlying purpose of the procedure. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 126, 233 P.3d 871 (2010); *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982). Under this standard, the City's approval of the boundary line adjustment was void.

The City's authority to approve a boundary line adjustment is limited by the City's own ordinances. The City has authority to approve **"if and only if:** … 5. The map includes acknowledged signatures of all parties having an interest in lots the lines of which are being adjusted." OMC 17.30.030 (CP 14-15, emphasis added). Berschauer had an interest in the land, but was not included on the application or the map. The City did not have authority to approve.

Even if the City could be said to have authority in this situation, its approval violated the procedure mandated by the ordinance, and did so in a manner that defeated the underlying purposes of the procedure. The requirement of including the signatures of all parties having an interest in the property serves to protect the property rights of all of the owners of any

interest. The requirement ensures that the boundaries cannot be adjusted without the involvement and approval of any person whose interest in the property could be affected. Approval of the boundary line adjustment without Berschauer's signature defeated the purpose of the signature requirement, allowing the State to unilaterally adjust the boundaries of Berschauer's land without his participation and approval and in violation of his property rights.

The City relies on an inapplicable standard to draw the line between void acts and those that are merely voidable, citing *Bilanko* for the proposition that failure to comply with a legal requirement is only void in cases of fraud or serious offense to public policy or when the law in question declares that the failure voids the act. Br. of Resp. at 10. However, the standard set forth in *Bilanko* applies only to corporations, not government entities. *Bilanko*, 185 Wn.2d at 450-51 (prefacing its description of the standard by stating, "condominium associations are organized as corporations, and corporations must act in accordance with any formalities 'prescribed by its charter, or by the general law.'") Corporations and government entities are treated differently when determining whether an act is ultra vires. *See Noel*, 98 Wn.2d at 379 (reasoning that different treatment is justified because, "Unlike a corporate shareholder, who may choose the corporate bodies in which she invests and

withdraw her investment at will, a citizen and taxpayer has only one government in which to 'invest' and may not withdraw except by death or expatriation."). As stated above, **government action,** as opposed to corporate action, is void *ab initio* where the government entity lacks any authority to take the action or where it fails to comply with a statutorily mandated procedure in a way that defeats the underlying purpose of the procedure. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 126, 233 P.3d 871 (2010); *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982).

In any event, failure to comply with a mandated procedure in a manner that defeats the purpose or policy behind the procedure would also be a "serious offense to public policy" under the City's proposed standard. Approval of the boundary line adjustment without Berschauer's signature had the effect of adjusting the boundaries of Berschauer's land without his consent, in violation of his property rights and of the constitutional prohibition of takings of land. *See* Const. art. 1 § 16. This violation is a serious offense to public policy, rendering the boundary line adjustment not merely voidable, but void *ab initio*.

2.3 The trial court erred in dismissing Berschauer's declaratory judgment action because a challenge to a void act is not subject to any statute of limitations.

An act that is void *ab initio*, is invalid from its inception, has no legal effect, and "cannot be validated by later ratification or events." *S. Tacoma Way*, 169 Wn.2d at 123. A void act can be challenged, and its invalidity confirmed, at any time. *Id.* at 124. The City's approval of the State's boundary line adjustment was void *ab initio*; therefore no statute of limitations applies to Berschauer's challenge.

The City argues that the boundary line adjustment was merely voidable. An act that is merely voidable is presumed valid until it is challenged and found to be invalid. *Bilanko*, 185 Wn.2d at 450. A challenge to a voidable act must be brought within the appropriate statute of limitations. *Id.* at 451. However, as noted above, the boundary line adjustment was void, not merely voidable, because it was done without authority and in violation of public policy. No statute of limitations can bar a challenge to a void act. *Id.* at 450.

The City continues to rely solely on *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), for the proposition that the LUPA statute of limitations applies even to void acts. But the City does not attempt to resolve the conflict between the general rule that no time bar applies to acts that

are void *ab initio* (*e.g.*, *S. Tacoma Way*) and the court's statements in *Habitat Watch* that LUPA's 21-day limitations period somehow does apply.

What is missing from *Habitat Watch* is any analysis of whether the special use permit extensions were truly void or merely voidable. The City tacitly acknowledges this when it argues that the facts in *Habitat Watch* supported an "alleged inference" of offense to public policy. But failure to provide required notice, as in *Habitat Watch*, does not render an act void, but merely voidable. *S. Tacoma Way, LLC*, 169 Wn.2d at 124. In this way, the application of the LUPA limitation period in *Habitat Watch* makes sense: because the permit extensions were merely voidable, they were subject to the limitations period. In contrast, because the boundary line adjustment here was void *ab initio*, no time bar can validate it after the fact. Because *Habitat Watch* involved an act that was merely voidable, any language in that decision purporting to apply to void acts goes beyond the facts of the case and is therefore dicta.

Application of the LUPA limitations period to a void act creates the absurd result of ratifying an action that, as a matter of law, was invalid from its inception and could not have any legal effect. To make matters worse, it would do so after the short time period of 21 days, even when persons entitled to

challenge the action have not been given any notice that it has taken place. The result would be an unlimited expansion of municipal power—so long as local government officials keep their unauthorized land use decisions under the radar for 21 days, they could do anything and their acts would become final and unassailable, no matter how repugnant to public policy. Void acts must be subject to challenge.

Berschauer argued that even if the LUPA statute of limitations applies, it could not begin to run because no final approval was ever issued under OMC 17.30.040. Br. of App. at 10. The City argues that the Court should give deference to the City's self-serving interpretation of that ordinance. However, because the City has failed to establish that it has actually "historically applied" this interpretation, the Court can only conclude that the interpretation is presented solely for purposes of this litigation and, therefore, no deference is due. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007) (no deference when the interpretation is merely a by-product of current litigation); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814-15, 828 P.2d 549 (1992) (requiring evidence of prior adoption of the interpretation as agency policy).

2.4 The alternative remedies doctrine does not bar Berschauer's action for declaratory relief.

The City raises, for the first time, the doctrine of alternative remedies, arguing that declaratory relief is not available when there is an adequate alternative remedy. Br. of Resp. at 17-19. This Court should disregard this argument because it was never raised in the trial court in the City's original motion or even in its reply. *See* CP 29-30, 71-75.

Even if this argument had been properly raised, it fails. Declaratory relief is not barred by the doctrine of alternative remedies. Rather, declaratory relief is available "whether or not further relief is **or could be** claimed." RCW 7.24.010 (emphasis added). Although prior case law applied the doctrine of adequate remedies to declaratory judgment actions, the Washington Supreme Court recently clarified that after the adoption of CR 57, "The existence of another adequate remedy **does not** preclude a judgment for declaratory relief in cases where it is appropriate." *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 605, 374 P.3d 151 (2016) (quoting CR 57) (emphasis added). The doctrine does not apply and does not justify the trial court's erroneous dismissal of Berschauer's declaratory judgment action.

Even if the doctrine did apply, Berschauer does not have an adequate alternative remedy at law. The City proposes that

Berschauer could apply for a boundary line adjustment of his own to reform the line to reflect his true ownership. Br. of Resp. at 18. However, to do so would require the cooperation of the State pursuant to OMC 17.30.030, because the boundary of the State's New Parcel 4 would have to be adjusted. Berschauer cannot compel the participation of the State without resorting to the courts for an injunction or declaratory judgment—such as the present action for declaratory relief. It cannot be said that a second declaratory judgment action is an adequate alternative remedy that would bar the first. Berschauer has no adequate alternative remedy. This doctrine does not justify the trial court's erroneous dismissal of Berschauer's declaratory judgment action. This Court should reverse.

2.5 The Court should deny Respondents' requests for attorney's fees.

Both the City and the State attempt to request an award of attorney's fees on appeal under RCW 4.84.370. Neither request complies with RAP 18.1, and both should be denied.

RAP 18.1 requires a party requesting fees on appeal to "devote a section of its opening brief to the request." A cursory request in a party's conclusion is insufficient under the rule. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013). Neither the City nor the State complied with this requirement.

The City provides a single sentence in its conclusion, citing the statute and claiming to be a prevailing party. Similarly, the State, as an afterthought in its conclusion, cites the statute and claims to have been a prevailing party at all stages. Neither party provides any argument as to what the statute actually requires or how the statute applies here. Both parties leave it to the Court to research the statute and search for a justification of any award. This is insufficient under RAP 18.1. The Court should deny both requests.

In addition, the statute does not apply here. The statute provides for an award of fees to the prevailing party on appeal of certain land use decisions:

> [R]easonable attorneys' fees and costs shall be awarded **to the prevailing party** or substantially prevailing party **on appeal** before the court of appeals or the supreme court **of a decision by a county, city, or town** to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

RCW 4.84.370(1). This is a declaratory judgment action, not an appeal from a land use decision. The plain language of the statute—"to the prevailing party … on appeal … of a decision"—contemplates direct appeals, not collateral attacks such as this.

For example, in *Kinderace LLC v. City of Sammamish*, 194 Wn. App. 835, 841 (2016), the city denied a reasonable use exception on property owned by Kinderace. *Id.* at 841. Kinderace filed both a LUPA petition and a regulatory takings claim—a collateral attack on the city's adverse land use decision. *Id.* at 841-42. After losing at the trial court, Kinderace appealed the dismissal of its takings claim but not its LUPA petition. *Id.* at 847-48. When the city prevailed on appeal, this Court declined to award attorney's fees, holding that RCW 4.84.370 did not apply to the regulatory takings claim. *Id.* Similarly, the statute does not apply to this declaratory judgment action.

Even if the statute does apply, the City is not entitled to an award because it prevailed only on procedural grounds. The City is not entitled to an award under subsection (1) because it cannot be the prevailing party before itself. *See Durland v. San Juan Cty.*, 182 Wn.2d 55, 77-78, 340 P.3d 191 (2014). The City can only qualify under subsection (2) if its decision was "upheld" on the merits. *See Id.* at 78-79. A public entity can only recover attorney's fees under RCW 4.84.370 if it succeeds in defending its decision on the merits, not on procedural grounds. *Id.* at 78. Here, the City has only argued procedural grounds, so it cannot prevail on the merits. The Court must deny the City's request for attorney's fees.

The State's request should also be denied where the State has not substantively participated in the appeal. The State's brief does nothing more than join in the City's brief and make a bald assertion of entitlement to attorney's fees. Given the State's non-involvement, any award of fees would be unreasonable. The Court should deny the State's request.

3. Conclusion

The City's approval of the State's boundary line adjustment was void *ab initio* because it was done without the approval of Berschauer, in contravention of public policy and Berschauer's property rights. A void act cannot be ratified by later acts or by the passage of time. Berschauer's declaratory judgment action is not subject to the LUPA statute of limitations. This Court should reverse and remand for further proceedings and should deny the requests for attorney's fees.

Respectfully submitted this 7th day of November, 2016.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevinhochhalter@cushmanlaw.com
924 Capitol Way S.
Olympia, WA 98501

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on November 7, 2016, I caused the foregoing document to be filed with the Court and served on counsel by the method indicated below:

Court of Appeals, Div. II 950 Broadway, #300 Tacoma, WA 998402	___ U. S. Mail ___ Legal Messenger _X_ Electronic Filing
W. Dale Kamerrer Attorney at Law dkamerrer@lldkb.com marry@lldkb.com	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail
Mark Barber City Attorney mbarber@ci.olympia.wa.us acoleman@ci.olympia.wa.us	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail
Brian Faller Assistant Attorney General brianf@atg.wa.gov angelab@atg.wa.gov melissae1@atg.wa.gov tpcef@atg.wa.gov	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail
Michael R. Scott Attorney at Law mrs@hcmp.com smp@hcmp.com	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail
Courtney L. Seim and Bryan Case Attorneys at Law cseim@riddellwilliams.com bcase@riddellwilliams.com agaigalaite@riddellwilliams.com croberts@riddellwilliams.com	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail

DATED this 7th day of November, 2016.

/s/ Rhonda Davidson

Rhonda Davidson, Legal Assistant
rdavidson@cushmanlaw.com
924 Capitol Way S.
Olympia, WA 98501
360-534-9183

CUSHMAN LAW OFFICES PS

November 07, 2016 - 3:00 PM

Transmittal Letter

Document Uploaded: 1-487446-Reply Brief.pdf

Case Name: Berschauer v. City

Court of Appeals Case Number: 48744-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Rhonda Davidson - Email: rdavidson@cushmanlaw.com